FILED
JUL 15 2003

(2)

No. 02-1814

In The

Supreme Court of the United States

CLIFTON P. GARDNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF PARAGON FOUNDATION IN SUPPORT OF PETITIONER

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26 pp

MOTION FOR LEAVE TO FILE BRIEF IN AMICUS CURIAE

Amicus Curiae, Paragon Foundation, hereby moves for permission to file its brief on grounds that it is deeply concerned with the issues of State jurisdiction, sovereignty and eminent domain, and believes these issues may not receive complete treatment in the briefs filed by the parties. Paragon submits that the following brief will contribute to the Court's understanding of the issues presented.

Counsel requested consent from the Solicitor General's office by telephone, but was directed to make such request in writing, which he has done. Nevertheless, as of the time of submission of the brief for printing, response to the request had not been received.

Respectfully submitted,

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INTEREST OF THE AMICUS CURIAE

The Paragon Foundation provides for the education, research and the exchange of ideas in an effort to promote and support Constitutional principles, individual freedoms, private property rights and the continuation of rural customs and culture. The Foundation and its members promote the renewal of the vision of the Founding Fathers for America.

In the past, whenever questions regarding the Federal Government's claim of jurisdiction over the public lands which lay within the Western States have arisen, questions regarding of the loss of constitutionally protected rights and the inability of admitted States to exercise municipal sovereignty, municipal jurisdiction and eminent domain within the full extent of their boarders because of the unconstitutional exercise of Article IV jurisdiction over federally claimed lands were not raised.

Amicus Curiae, share the concerns of Cliff Gardner, and respectfully request the Petition for Writ of Certiorari be granted and that the above stated concerns regarding, municipal sovereignty, jurisdiction, eminent domain and the loss of individual rights, be specifically addressed.

Counsel requested consent from the Solicitor General's office by telephone, but was directed to make such request in writing, which he has done. Nevertheless, a response to that request had not been received at the time for submitting the brief for printing. Counsel for a party did not author this brief in whole or in part. No other person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

I

THE RIGHT OF ADMITTED STATES TO EXERCISE MUNICIPAL SOVEREIGNTY, JURISDICTION AND EMINENT DOMAIN OVER THE PUBLIC LANDS WHICH LAY WITHIN THEIR BORDERS.

The confusion which now exists, as to whether the Federal Government can lawfully exercise municipal sovereignty, jurisdiction and eminent domain over the public lands which lay within a State's boarders was not evident during the early history of our nation. As an example, in *Aldermen v. Eslava,* the Court said:

> **That the original states acquired by the revolution the entire rights of soil, and of sovereignty, is most certain. And if it be true, that Alabama was admitted on an equal footing in regards to the rights of soil with the original states, she can hold the high lands equally with the land covered by navigable water; and so can nine other states equally hold, to the utter destruction of all claim to the lands heretofore indisputably recognized as belonging to the United States, as being a common fund of the Union. — *Mayor and Aldermen of the City of Mobile v. Eslava*, 41 U.S. 234 (1842) *Emphasis added.***

> **We think a proper examination of this subject will show, that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama, or any of the new states were formed except for the temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia**

> **legislatures, and the deeds of cession executed by them to the United States, and the trust created by the treaty with the French republic, of the 30th of April, 1803, ceding Louisiana. ... Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine is to deny that Alabama has been admitted into the union on an equal footing with the original states, the constitution, laws and compacts, to the contrary notwithstanding. --- *Pollard's Lessee v. Hagan,*44US 212(1845) *Emphasis added.***

The language that is incorporated in the above two paragraphs is extremely important to this case.

First the Court is speaking of the "right of soil" or "rights of soil" in a manner which indicates that it was believed at that time that the right of an admitted State to own and control the lands that lay within its boarder was an intricate part of, or one and the same as, the right to exercise municipal sovereignty and jurisdiction.

In the North Carolina constitution and in the Georgia constitution there are recitals to the effect that the "property of soil in a free government" is "one of the essential rights of the collective body of the people,". And that by statute in Georgia, all land in Georgia is allodial, that is, held of the State. The duties known as quit rents, take the form of taxes assessed on land and are merged in the larger sovereign power of general taxation. Accordingly, the paramount title and eminent domain of a state means the absolute ownership of all lands within its boundaries

and is an intrinsic and fundamental attribute of sovereignty. No state can be said to be sovereign that does not have this basic and essential element of sovereignty. Accordingly, when the State of Nevada was admitted to the United States on an equal footing with the original states in all respects whatever, this meant with full sovereignty and included the paramount title and eminent domain of all lands within its boundaries.

Second, the Court makes it clear that, it is, pursuant to the equal footing doctrine, that the right to exercise municipal sovereignty, the right to exercise municipal jurisdiction, and the right of soil, are to pass to all newly created States, upon their admission to the Union.

And third, the Court makes it clear, it matters not, whether lands or territory are acquired by the federal government by treaty (which in this case, was by the Treaty for the Purchase of the Louisiana Territory) or by cession (from one of the original states) such lands or territory, as well as municipal sovereignty and jurisdiction, are to be held only temporarily and in trust for future States.

In this regard, it is significant to note, that various States have been formed from lands which have been acquired in various ways. There are three States that have been formed from lands taken partially from the Northwest Territory and partially from later acquired territory. These States are Minnesota, Mississippi, and Alabama. In the case of Alabama the largest portion of the State was made up of lands taken from the Northwest Territory with a smaller portion taken from those lands which were acquired by the Louisiana Purchase. The *Pollard v. Hagan* dispute involved lands which are located within the City of Mobile; which lands were acquired via the Louisiana Purchase.

Thus it can be seen that the Court in the *Pollard* case, was not speaking of those States which were created out of the Northwest Territory alone, when it said that all States were entitled to exercise municipal sovereignty, jurisdiction and rights of soil over all the territory within its boarders. It was speaking of States which were to be created out of later acquired territory as well.

This is not just chance language or mere dicta we are herein and above quoting, for such concepts are not only reinforced and upheld elsewhere within the *Pollard v. Hagan* decision, but they are upheld in *Scott v. Sandford* 60 U.S. 393 (U.S. Mo. 1856), *American Insurance v. Canter* 26 U.S. 511 (1828), *Benner v. Porter* 50 U.S. 235 (1850), *Downes v. Bidwell*, 182 U.S. 244 (1901), and *Shively v. Bowlby*, 15 U.S. 1 (1894).

> **Whenever the United States shall have fully executed these trust, the municipal sovereignty of the new states will be complete, throughout their respective borders, and they, and the original states will be upon an equal footing, in all respects whatever ... and as soon as these purposes could be accomplished, the power of the United States over these lands, as property, was to cease. — *Pollard v. Hagan,* 44 U.S. (3 How.) At 222. *Emphasis added.***
>
> **Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the union on an equal footing with**

> **the original states, the constitution, laws, and compact, to the contrary notwithstanding. --- *Pollard v. Hagan*, 44 U.S. (3 How.) At 228 -229. *Emphasis added.***

Thus, the Court could not have made it more clear; by the Constitution, by the Equal Footing Doctrine, and by the right of municipal sovereignty, unappropriated lands and municipal sovereignty must pass to newly created States upon their admission to the Union, (unless of course, a compact exists which requires that said unappropriated lands are to be sold by the Federal Government for the purpose of paying off a war debt, which in the case of the western public lands, no such compact exists).

Later decisions which indicate otherwise cannot stand, for when these findings and the findings of a later date are weighed against the Constitution itself, and the true intent of the Founders with regard to the intended protection of personal rights is considered, there is no question as to which findings are correct. Persons cannot be deprived of their constitutionally protected rights, simply because it is assumed that Article IV jurisdiction can be exercised within an admitted State.

The bottom line is; it is not that every State should poses the right to exercise municipal sovereignty, jurisdiction, eminent domain, or rights of soil within the full extent of their territory, that is important; but that every State should poses the right to exercise municipal sovereignty, jurisdiction, eminent domain, and right of soil over the full extent of their territory, so as to protect the freedoms and liberty of its people that is important.

II

KLEPPE V. NEW MEXICO AND THE PUBLIC LANDS

In many of the more recent rulings, the courts have held that Congress' power under the property clause to administer its own property claimed by the United States is virtually unlimited. *Kleppe v. New Mexico,* 426 U.S. at 539.

This expression may be accurate when applied to territory outside the boundaries of a State, but its application to 87% or more of the area of an admitted State has the effect of holding that land in territorial status.

The *Kleppe* opinion has been severely criticized in the scholarly writings of Professor David E. Engdahl. In his treatise *Constitutional Federalism In A Nutshell,* Second Edition, West Publishing Co. (1987) Professor Engdahl writes:

> **In 1976, with an opinion that displays disregard of what had been established for two centuries before, the Supreme Court unanimously (albeit unawares) revolutionized its doctrine under that clause. (Article IV, Sec. 3, Cl. 2) *Kleppe v. New Mexico,* 426 U.S. 529 (1976) Since this Court's opinion in *Kleppe*, that jurisdiction is claimed to rest on ownership of the public lands. No act of Congress conferring such jurisdiction on the Federal Courts is relied on. Jurisdiction is claimed under Article IV, Section 3, Clause 2. The briefing on behalf of New Mexico was inept; and for its part, the Court conspicuously failed to deal with many of the relevant cases and demonstrably misunderstood others. *Kleppe* held that "Congress**

exercises the powers both of a proprietor and of a legislature over the public domain." ...On this view, Congress can make rules for federal property which have no relation whatever to any matter of legitimate federal concern, and any such rule, being legislative in character, "necessarily overrides conflicting state laws under the Supremacy Clause." ...as to property located within the boundaries of states, that is a profoundly novel proposition which makes a mockery of the basic purpose of enumerated powers doctrine... What *Kleppe* really means is that over all the vast federal public domain within states, the United States has plenary, general governmental jurisdiction, and is not confined to those enumerated powers which it may exercise elsewhere in the country. It means that as to the east and the middle west, enumerated powers doctrine remains the foundation of constitutional power analysis, but as to the roughly half of the country from the Rocky Mountain states westward it has absolutely no significance at all.

Article IV of the Constitution does not provide authority to hold lands, only jurisdiction to govern lands belonging to the United States. It was directed by the founders solely to dealing with the Northwest Territory, lands that had been ceded to the federal government by the States prior to the adoption of the Constitution. The property clause was confined and was intended to be confined to the area of the States as settled by the treaty with Great Britain and have no influence on territory afterwards acquired from a foreign government. — *Scott v. Sandford*, 60 U.S. 393 (U.S. Mo. 1856) *Downes v. Bidwell*, 182 U.S. 244 (1901)

The United States acquired additional lands through treaty and conquest. Such lands were acquired and held pursuant to the treaty and war powers and as powers obtained by the United States as a nation as an incident of national sovereignty, not by any provision in the Constitution. *Cross v. Harrison*, 57 U.S. 164 (1853) Article IV provides legislative jurisdiction over such lands while they are in territorial status. *United States v. Gratiot*, 39 U.S. 526 (1840). Often, language from *Gratoit* is quoted in such manner as to give the impression that the Court, in that case, is sanctioning the exercise of Art. IV jurisdiction within admitted States. However, the language in the *Gratiot* case quoted in its entirety is as follows:

> **The term "territory" as here used, is merely descriptive of one kind of property, and is equivalent to the words "lands". And Congress has the same power over it as any other property belonging to the United States; and this power is vested in Congress without limitations, and has been considered the foundation upon which the territorial governments rest. --- Pg. 537**

Pursuant to such full governance power, Congress may establish an executive authority, a legislature, or courts of a nature of its own choosing. Indeed, a territorial act is itself a constitution. Clearly, such governance power must cease immediately upon the admission of a State to the Union. *American Insurance v. Canter*, 26 U.S. 511 (1828), *Benner v. Porter*, 50 U.S. 235 (1850), *Downes v. Bidwell*, 182 U.S. 244 (1901).

The Constitution deals with States, their people and their representatives. The principle object of the territorial clause was to transfer to the new government temporary

governance over the Northwest Territory. The Constitution does not extend to territories of its own force. Congress has power over territory it does not possess in the States. *Downes v. Bidwell*, pg 773

The judicial power of territorial courts, as well as the territorial government itself, was long ago determined to cease upon a State's admission to the Union. *Downes v. Bidwell*, 182 U.S. 244. In *Brenner v. Porter* at 235 the Court said:

> **We think it clear, therefore, that on the unconditional admission of Florida into the Union as a State, ...the Territorial government was displaced, abrogated, every part of it; and that no power of jurisdiction existed within her limits, except that derived from the State authority, and that by force and operation of the Federal Constitution and laws of Congress;... The admission of the State into the Union brought the Territory under the full and complete operation of the Federal Constitution, and the judicial power of the Union could be exercised only in conformity to the provisions of that instrument... The State authority was destructive of the Territorial; and, in connection with the establishment of the Federal jurisdiction, the organization of the government, State and Federal, under the Constitution of the Union, became complete throughout her limits. No place was left unoccupied for the Territorial organization. --- Pg. 242-3. *Emphasis added.***

The Federal Government's claim of retained ownership and the assertion of Article IV jurisdiction over such lands is clearly at odds with the above quoted holdings.

III

DOES THE EXERCISE OF ARTICLE IV JURISDICTION WITHIN AN ADMITTED STATE NOT VIOLATE THE GUARANTEE CLAUSE

The Guarantee Clause declares that, "[T]he United States shall guarantee to every State in this Union a Republican Form of Government." A republican government is one in which the people control their rulers. It is a government responsible to its voters rather than to any outside agency. John Locke, *Second Treatise of Government*, Sec. 149 (C.B. McPherson ed. 1980) (6th ed. London 1764). A republican government is "one ...(where) the Supreme Power resides in the body of the people." *Chisholm v. Georgia*, 2 U.S.(2 Dall.) 419 (1793). The language of the Guarantee Clause asserts a limit on the power of the federal government to infringe upon State autonomy. Exemption of unappropriated land from State autonomy, taxation and substitution of federal payments in lieu of taxes, makes State officers responsible, not to the people of the State, but, dependent on the federal government. Such disassociation of the power to spend and the power to tax destroys accountability and would "encourage few even casually acquainted with the writings of Montesquieu and the Federalist papers to assert that th[is] State enjoyed a Republican Form of Government." *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975). A republican form of government is one in which the people make important decisions affecting their community. *Heimbach v. Chu*, No. 83 Cov. 5318 (S.D.N.Y. Dec. 23, 1983) (LEXIS, Genfed library, Dist file), aff'd on other grounds, 744 F.2d 11 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985).

The Guarantee Clause reserves for the States those matters that lie "at the heart of representative government." *Gregory v. Ashcroft*, 501 U.S. at 463. By limiting the efforts of Congress to control core local functions, "[t]he States thereby retain the ability to set their legislative agendas; State government officials remain accountable to the local electorate," *New York*, 112 S. Ct. at 2433. All States are guaranteed a republican form of government and, therefore, the Federal Government may not exercise local municipal powers in one State which it does not exercise in the others:

> **All states, after their admission into the Federal Union, stand upon equal footing and the constitutional duty of guaranteeing each state a republican form of government gives Congress no power in admitting a state to impose restriction which would operate to deprive that state of equality with other states. — *Butler v. Thompson*, 97 F. Supp. 17, 20-21 (E.D. Va.), aff'd 341 U.S. 937 (1951).**

The Federal Government's claim of ownership and jurisdiction over the unappropriated lands deprives the Gardners of the ability to hold elected officials responsible for decisions regarding essential local functions, including land use controls such as nuisance, overpopulation of feral horses, fire protection, economic development, providing infrastructure, and the host of municipal and other police power activities which lie at the nucleus of State and local government.

IV

DOES THE EXERCISE OF ARTICLE IV JURISDICTION WITHIN ADMITTED STATES NOT VIOLATE THE 10th AMENDMENT TO THE CONSTITUTION

The mere fact that the Constitution may, in instances, authorize Congress to exercise certain powers, does not, by itself, end the constitutional inquiry. Various other provisions which are incorporated within the Constitution, including those which protect the rights of individuals must be considered as well.

It makes no sense at all, that under our constitutional system, which places so much emphasis on duel sovereignty and the limited powers doctrine, that the Federal Government be granted such authority as to exercise Article IV jurisdiction within admitted States of the Union. Unlike so many other enumerated powers, the power that is derived from Article IV, Sec. 3, Cl. 2, of the Constitution (as it is now defined by the courts) is all encompassing. It is plenary, it is without limitation, it overrides all conflicting State law, and it places Congress in a position whereby it can deprive citizens of any or all of their God given rights at will.

The principle of dual sovereignty, like the principle of separation of powers, is a structural component embedded in the Constitution; thus, in ascertaining whether Congress possesses constitutional authority to enact particular legislation, this Court must go beyond merely identifying an enumerated power in Article I of the Constitution:

> **Congress exercises its conferred powers subject to the limitations contained in the Constitution.**

> **Thus, for example, under the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment. The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which ... is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power. — *New York v. United States*, 505 U.S., 144 112 S. Ct. 2408, 2418 (1992)**

> **[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union. ... The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States. — *Texas v. White*, 74 U.S. (1 Wall.) 700, 725 (1869)**

The powers which belong to the United States do not belong to the State, and the converse is also true:

> **In a case like this one, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state**

> **sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress. — *New York*, Id. at 156.**

Only by preserving dual sovereignty can this Court ensure the absolute constitutional command that "neither government may destroy the other nor curtail in any substantial manner the exercise of its powers." *Id.* at 2421 (quoting *Tafflin v. Levitt*, 493 U.S. 455, 458, 110 S.Ct. 792, 795, 107 L.Ed.2d 887 (1990)).

The Constitution prevents the accumulation of power in a national government in order to protect individual liberty. In *New York v. U. S.*, 505 U.S. 144 at 181, the Court said:

> **The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end itself: 'Rather, federalism secures to citizens the liberties that derive from the defusion of sovereign power.' *Coleman v. Thompson*, 501 U.S. 722, 114 L Ed 2d 640, 111 s Ct 2546 (1991). 'Just as the separations and independence of the coordinated Branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, ...a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. *Gregory v. Ashcroft*, 501 U.S. 452 (1992)**

The core state powers which the United States cannot invade and Nevada cannot relinquish to the federal government include the "power of sovereignty, the power to govern men and things within the limits of its dominion." *Nebbia v. New York*, 291 U.S. 502, 524 (1934). This general power encompasses the right and duty of States "to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community. .... [and] power can neither be abdicated nor bargained away." *Chicago & Alton R.R. Co. v. Tranbarger*, 238 U.S. 67, 77 (1915); see also *City of El Paso v. Simmons*, 379 U.S. 497, 508 (1965) ("the State has the sovereign right ... to protect the ... general welfare of the people..."); *Breard v. Alexandria*, 341 U.S. 622, 640 (1951)

This Court must preserve these police powers for the States, as it is the foundation of dual sovereignty:

> **The maintenance of the authority of the States over matters purely local is ... essential to the preservation of our institutions... In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. The power of the States to regulate their purely internal affairs by such laws as seem wise to local authority is inherent and has never been surrendered to the general government. — *Hammer v. Dagenhart*, 247 U.S. 251, 275 (1918)**

Vindication of the federal claim of unlimited jurisdiction over such lands eliminates the State's power of eminent domain, which was another of the powers to which

the new States succeeded. *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 250-51 (1833); *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 532 (1848). This Court has held that power to be an inherent incident of sovereignty and the "offspring of political necessity." *Bauman v. Ross*, 167 U.S. 548, 574 (1897). The individual States, as political sovereigns, retain such power, having succeeded to the same independence. That power vested in the State the ability to create the instrumentalities of commerce and settlement: the building of roads and government buildings and, much later, railroad and telegraph lines is an incident of the right of eminent domain:

> The right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the state, is called the eminent domain. It is evident that this right is, in certain cases, necessary to him who governs, and is, consequently, a part of the empire, or sovereign power. Vat. *Law of Nations*, section 244. — *Pollard*, at 223. *Emphasis added.*

This enabled the States to extend their economies, increase their tax bases and establish governmental authority over all corners of their land area.

Vindication of the claimed jurisdiction by the Federal Government results in 87%, or more, of the land area of Nevada being unavailable for taxation. An essential incident of State sovereignty is the power to tax. *Van Brocklin v Tennessee*, 117 U.S. at 155. The original thirteen States poses the power to tax all lands within their borders with the exception of those to which they voluntarily surrendered that power to the Federal Government.

V

DOES THE EXERCISE OF ARTICLE IV JURISDICTION WITHIN ADMITTED STATES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

In the instant action, the subject provisions of the Code of Federal Regulations place Cliff Gardner and his family in a class of persons who's property is surrounded by federally regulated lands. Such regulations control watershed production, (fire) fuel load situations, and grazing, all of which, would be protected by State and common law if it were not for the Federal Government's exercise of Art. IV jurisdiction within the State of Nevada. By enforcement of such regulations upon this limited "distinct and insular" minority, the Federal Government has subjected the Gardners to unequal protection of the laws.

The Gardners are attempting to protect their property rights in water, forage, and range improvements, as well as the economic viability of their family ranching operation and the ranch itself from catastrophic wildfire. The federal regulations, as applied, create a class and threaten the fundamental rights of that class. Although appearing to be national in scope, these regulations create no threat to the lives or property of ranchers, farmers, or other rural occupants of New York, for example, simply because a similar situation does not exist within the Eastern States.

In *Evans v. Cornman*, 90 S.Ct. 1752, 398 U.S. 419, 26 L.Ed.2d 370 (U.S.Md. 1970) the court had occasion to consider the attempt by the State of Maryland to exclude residents of a federal enclave located in Maryland from voting in local elections. The court made the following observations:

> **"...lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment. (Citations omitted) Moreover, the right to vote, as the citizens link to his laws and government, is protective of all fundamental rights and privileges. See *Yick Wo v. Hopkins*, ...And before that right can be restricted, the purpose of the restriction and the assertively overriding interests served by it must meet close constitutional scrutiny."**

Maryland was arguing that the purpose of the exclusion was that only those citizens who were primarily or substantially interested in or affected by electoral decisions have a voice in making them. The court noted:

> **"This Court has held that a State may not dilute a person's vote to give weight to other interests, (citing *Reynolds v. Sims*) ...fencing out from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. *Carrington v. Rash*, 380 U.S. at 94"**

The Court then affirms the District Court conclusion that it was a violation of the equal protection clause of the Fourteenth Amendment for Maryland to deny the enclave residents the right to vote in local elections.

The analogy of "fencing out" is one a rancher can readily relate to. The instant action, however, concerns a factual setting in which the Gardners' rights to equal protection are being denied by a "fencing in". That is, the entire nation has been included in the franchise that decides what happens to the land surrounding the Gardners' ranch. Cliff Gardner is denied equal protection because his vote on

matters of purely local concern have been diluted by the inclusion of the entire nation in those decisions.

In *Adarand Constructors, Inc., v. Pena*, 115 S.Ct. 2097 (1995), the Court found that the equal protection obligations imposed on the Federal Government by the Fifth Amendment were equal to those which are imposed on the States by the Fourteenth Amendment. Accordingly, the dilution of the Gardners' vote with regards to local land control denies the Gardners' equal protection of the laws.

Cliff Gardner is an individual, who needs the protection of politically responsive local officials who will protect his liberties. It is a fundamental violation of his rights to claim that he is a citizen of the State of Nevada and the United States of America, yet be located in an area wherein agencies of the Federal Government can exercise unlimited powers over the lands and resources upon which he and his neighbors rely.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the petition for Writ of Certiorari be granted.

Dated the 11th day of July, 2003.

Respectfully submitted,

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